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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

E. G. SWINDLEHURST,
Petitioner,
vs.
AMERICAN FIDELITY FIRE INSURANCE COMPANY,
a foreign insurance company, and
HENRY SALES, d/b/a Sales Welding,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The extension of time for filing a response granted to defendant Henry Sales on March 30, 1967 permits preparation of a Brief in support of the petition for a Writ of Certiorari and in reply to defendant American Fidelity Fire Insurance Company's brief in opposition, and it is respectfully submitted herewith, under Rule 38 4(a) Rules of the Supreme Court.

BASIS OF WRIT

The basis for petitioner's request for a Writ of Certiorari is the invasion of the constitutional guaranty, "No fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rule of common law" by the Michigan Court of Appeals in ordering the Trial Court's judgment reversed because he should have granted a motion to dismiss on the grounds of res judicata made eight years earlier.

The situation presented here was the subject of a finding of this Court in *Slocum v. N. Y. Insurance Co.*, 228 US 364, where, on page 413, *Fowle v. Alexander*, 11 Wheaton 320, was quoted as follows:

> "Upon examination of the case at bar, it will be at once perceived that the demurrer to the evidence tried by the principles already stated is fatally defective. But when the demurrer was so framed as to let in defendants' evidence and thus rebut what the other side aimed to establish and to overthrow the presumption arising therefrom by counter presumptions it was the duty of the Circuit Court to overrule the demurrer as incorrect and untenable in principle. The question referred by it to the Court was not a question of law but of fact."

The doctrine of res judicata is, as a plea in bar, applicable to the conclusive determination of fact although it may include questions of law; *Freeman, Judgments* 5th ed p. 1328, 1329. The ultimate answer to mixed questions of law and fact must come from the jury; *Tucker v. Spalding*, 13 Wall US 453.

In this case the question of res judicata, based on prior determination, was raised on motion and resolved as being without merit. Thereafter, the defendant made it a matter of affirmative defense and presented evidence for jury consideration in support of it, argued it to the jury and requested jury instructions on it. The adverse jury verdict rejected it as a question of fact.

The same evidence and arguments were presented to the Court of Appeals on cross-appeal and was there reexamined. Their decision to reverse for the reasons that "the issue of the prior suit and the instant suit are the same" and "that the justifiable controversy in this case had been heretofore determined by a Court of competent jurisdiction" was based on their re-examination.

The findings of issues of fact by the Court, upon evidence, is altogether unknown to the common law Court

and cannot be recognized as a judicial act; *Rogers v. U. S.*, 141 US 548.

Petitioner respectfully requests a Writ of Certiorari to reverse the judgment that was based on an action, not judicial in nature, and in violation of applicant's constitutional guaranty as set forth in the Seventh Amendment.

REPLY TO DEFENDANT AMERICAN FIDELITY FIRE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO THE WRIT

To this petition, the defendant American Fidelity Fire Insurance Company, says:

A. The Seventh Amendment is inapplicable to Civil Trials in State Courts:

The cases defendant insurance company cited pertain to the first portion of this *Amendment* — "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." He cites no cases on the constitutional guaranty portion that follows: "No fact tried by a jury shall be otherwise re-examined in any Court of the United States except according to the rules of common law."

It is conceded that the provision for a jury trial is a matter for the States and such provisions or the absence of it might be considered outside the constitutional guaranty. However, once a jury trial is in operation and terminated, the facts involved clearly may not be re-examined, for to do so, invades the province of the jury and violates the constitutional guaranty.

The constitutional guaranty to trial by jury is limited to the determination by the jury of controverted issues of fact; *Baltimore & Carolina Lines v. Redman*, 295 US 654.

The jury operation became part of the remedy guaranteed by the Constitution. Under the *Seventh Amendment* to the Federal Constitution our Appellate Courts can neither determine facts found by a jury any more than a lower Court can determine them; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 US 355.

Application of the *Seventh Amendment* to cases brought to the United States Supreme Court from state Courts was indicated in *N. Y. Times v. Sullivan,* 376 US 254, as follows: "This Amendment *(Seventh)* providing no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law is applicable to state cases coming to the Supreme Court."

> "As a practical matter since the doctrine has been established that the due process of law clause of the *Fourteenth Amendment* in its concept of 'liberty' forbids a denial of any of the fundamental principles of liberty and justice, the rule is well established that any of the rights enumerated in the first eight amendments, which may also be held to be in the nature of fundamental principles of liberty and justice, are absolutely protected from any state action or infringement by the *Fourteenth Amendment* in exactly the same manner as they are protected from federal abridgment by the guarantees of the *Federal Bill of Rights*". 16 Am. Jur. 2d § 334, p. 642.

and

> "The Supreme Court pointed out at a fairly early date after enactment of the *Fourteenth Amendment* that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action because denial of them would be denied of due process of law.
>
> "The general test as to whether a right is so included in the conception of due process of law was said to be: 'Is it a fundamental principle of liberty and justice which inheres to the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law'." *Twining v. New Jersey,* 211 US 78.

Petitioner's right passes this test. Petitioner's right to have the facts that were the basis for the jury verdict

stand without re-examination is a fundamental principle of liberty and justice, safeguarded by the *Seventh Amendment* as to fact re-examination, is an inalienable right, and is of a nature that pertains to due process of law and, therefore, should be declared essential to due process of law; this right should be absolutely protected from any state action or infringement on the part of the Michigan Court of Appeals and the Michigan Supreme Court.

B. A State Appellate Court can set aside a jury verdict where no fact question exists.

Counsel for defendant American Fidelity Fire Insurance Company makes reference to and quotes *Michigan Court Rule 18* correctly so far as he went. He neglected to set forth Section 3 thereof which states:

> "If upon the hearing of such motion, the opposite party shall present affidavits on the proofs denying the facts alleged or establishing facts obviating the objections, the Court may take proofs and hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved, the Court may deny the motion without prejudice and *shall* deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury."

The defendant had the benefit of a court decision on motion and appellate review which should have resolved the question with prejudice but since disputed facts were involved and the action was one at law with a jury demanded, it was also submitted to the jury. There being no claim of insufficient evidence to support the verdict by defendant American Fidelity Fire Insurance Company, the claimed application of the doctrine of res judicata was resolved as a question of fact by the jury in a final manner.

It is to be noted that the Court of Appeals treated this matter as a motion to dismiss on the grounds of res judicata instead of motions for directed verdicts and for judgment notwithstanding the verdicts as set forth by defendant American Fidelity Fire Insurance Co. (page 14 — petition) (6a).

Petitioner has shown the motion to dismiss matter was not available for consideration by the Court of Appeals but the defense might be deemed available under the other designation. In this case it should be treated as set forth in *Sandra Lee Neely v. Martin K. Eby Construction Co.*, No. 12 October Term, March 20, 1967:

> "The opinion in the above cases (*Cone v. West Virginia Pulp & Paper Co.*, 330 US 212; *Globe Liquor Co. v. San Roman*, 332 US 571; *Johnson v. New York, H. H. & H. R. R.*, 344 US 48) make it clear that an Appellate Court may *not* order judgment notwithstanding verdict where the verdict loser has failed strictly to comply with the procedural requirements of *Rule 50(b)* or where the record reveals a new trial issue which has not been resolved. Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial some or all of which should have been passed on by the district court rather than the Court of Appeals because of the judge's first-hand knowledge of witnesses, testimony and issues because of his feel of the overall case. These are very valid concerns to which the Court of Appeals should be constantly alert."

In this respect, *Michigan GCR 515* is modeled after and is deemed identical to *Rule 50(b)*; defendants' only motions made within the 20 days time allowed was for a new trial; the motion for judgment notwithstanding the verdict was not timely, being made seven months later than entry of judgment; and the record reveals an issue of a new trial that has not been resolved.

Therefore, even if defendant American Fidelity Fire Insurance Co.'s cross-appeal is treated as a judgment notwithstanding the verdict, it should be denied. There being no question of law before the Appellate Court, their action was on the facts and was, therefore, an invasion of the province of the jury.

C. Interlocutory order of Michigan Supreme Court in 1958 not final order.

This order was the result of defendant American Fidelity Fire Insurance Company proceeding under Section 14, P.A. 314, 1915, *Michigan Statutes Annotated* 27.2604. Section 15 states:

> "Upon the filing of a petition for a Writ of Certiorari in such case, the same shall be allowed and the writ issued, unless the justice or justices considering the application shall affirmatively determine from a consideration of the petition for such writ and the brief accompanying the same that such petition does not present a meritorious question."

Whether it was a final order or not is not deemed material when the procedure provided for in *Michigan Court Rule 18,* Section 3, supra, is considered but it is an affirmative finding of no merit to defendant's claim of res judicata by the highest court in the state. This resolved the question of law on July 24, 1958. Defendant American Fidelity Fire Insurance Company insisted on presenting this matter again, as a question of fact, for jury determination. After defendant insurance company presented the files of Case No. 18,020 and other evidence to the jury, re-examination by the Court of Appeals of these facts and their decision based thereon to order dismissal of this cause violated the *Seventh Amendment* by invading the province of the jury and was not a judicial act.

The three cases cited by defendant American Fidelity Fire Insurance Co. in support of their proposition do not involve conversion and, more important, do not have a jury involved.

D. Michigan Supreme Court order of July 11, 1966 affirmed conclusions and result reached by the Michigan Court of Appeals.

This action was, in fact, a joining in the invasion of applicant's constitutional guaranty. It might also be considered evasion and when a writ of certiorari is issued a further invasion of the *Seventh Amendment* guaranty

against re-examination of facts should appear. If it does, this action should be deemed not a judicial act and reversed.

The indication that the *Seventh Amendment* is concerned with substance, not form, is made by both the majority and dissenting opinions in *Slocum v. N. Y. Insurance Co., supra.* The majority opinion traced the history of this amendment and quoted from many early cases. *Parsons v. Bedford* (1830) is quoted as stating that trial by jury is justly dear to the American people, that every encroachment upon it is watched with great jealousy and that it is a fundamental guarantee of rights and liberty of people.

Since *Slocum v. N. Y. Insurance Co., supra,* (1912), it appears that the decisions on the *Seventh Amendment* have involved insufficient evidence to support the verdict situations.

This case has sufficient evidence to support the verdict. "The substantial thing" referred to in *Slocum v. N. Y. Insurance Co., supra,* is before the Court, "that the common law recognizes that the function of the jury was to deal with controversies of fact."

If petitioner's fundamental guarantee on the matter of substance here is recognized and enforced the jury verdict may be restored to him.

At this point reference should be made to defendant American Fidelity Fire Insurance Company's claim the petitioner failed to comply with the Court Rules and was not timely. Every effort has been made to follow the procedure set forth in *American Jurisprudence Pleading and Practice* as well as follow the guidance available from the office of the Solicitor General of Michigan. Our famous January blizzard made a request for an extension of time necessary. The application was filed one week in advance of the extension expiration. It is trusted these matters will not interfere with consideration of the basic issue.

While defendant American Fidelity Fire Insurance Company, in its brief in opposition, does not mention the bias matter resulting from the Court of Appeals adopting portions of its brief as their opinion, objection is made to the claim of prejudice based on plaintiff's name. I know

not what others may call it but the treatment plaintiff has received indicates prejudice to me. Reaction to petitioner's name appears as the only explanation for the continued and usually voluntary action taken against his interests. Again; I hope and trust this Court will not have this reaction.

ANALYSIS OF APPELLATE COURT DECISION PERTAINING TO HENRY SALES

In regard to the Appellate Courts' action concerning defendant Sales, the file of Berrien County, Michigan, Case No. 9754, had been received as an exhibit by stipulation before the trial; the instruments pertaining to the sales under the statutory provision were also in evidence by stipulation; defendant Sales had judgment for the repair bill and storage; there was, therefore, an issue of fact as to whether there was any basis for a lien upon which to base a statutory Garagekeeper's Lien which was set up as an affirmative defense by defendant Sales. On cross-examination, plaintiff testified he had not received notice of the alleged sale. This issue was one of fact for the jury. While there was material evidence in the record, it was not plaintiff's duty to provide evidence in support of defendant Sales' affirmative defense. Defendant Sales, in presenting his case, introduced evidence in support of the exhibits. These matters were facts for jury consideration and on appeal, after the court had not reserved judgment on them, were barred from consideration by the Appellate Court on the grounds stated. Furthermore, while Henry Sales filed a motion for a new trial, timely, on December 19, 1962, the motion for judgment notwithstanding the verdict was not timely, being made on July 17, 1963. The Court Rule in effect during the twenty days after entry of judgment did not treat these motions as merged.

The decisions of this Court from *Slocum* (1912) to *Neely* (1967) indicate that Appellate Courts may not review directed verdict decisions unless there has been a timely motion to have the verdict and any judgment entered set aside for the reasons set forth in the motion for a di-

rected verdict. A review without compliance with this requirement was deemed an invasion of the province of the jury. The Appellate Court was never granted greater right or authority than the Trial Court could have exercised and strict requirements of practice as to timely action were adhered to in adition to determining all issues in a light most favorable to the opposite party, usually the plaintiff, on questions of sufficiency of evidence; *Montgomery Ward & Co. v. Duncan*, 311 US 243.

If these principles are applied the Court of Appeals' action regarding defendant Henry Sales must be deemed an invasion of the province of the jury and should therefore be reversed. This is true because of the common law requirements and the decisions in cases, *Globe Liquor Co. v. San Roman, supra, Johnson v. New York H. H. & H. R. R., supra* and *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 US 801.

RELIEF

Since the petitioner claims he has been deprived of a constitutional guaranty, the following decisions are deemed applicable:

> "The Supreme Court of the United States will make an independent examination of the facts in the case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the constitution." *Craig v. Harvey*, 331 US 367; 54 Am. Jur. 859.

> "In cases where the Federal Constitutional rights are alleged to have been infringed by the state action it is incumbent on the Supreme Court of the United States to inquire not merely whether those rights have been denied in express terms but also whether they have been denied in substance and effect and to review independently both the legal issues and those factual matters with which they are co-mingled." *Oyama v. California*, 332 US 633; 54 Am. Jur. 859.

When this action is taken it will be apparent that plaintiff's case is based on: Conversion by an insurance company of an income producing tractor and trailer used in hauling steel interstate that had a net income in excess of $6,000.00 per year for its useful life. The defendant American Fidelity Fire Insurance Company, a New York corporation, took this equipment, in nearly new condition, for upset repairs and it was not returned. Various actions were taken by defendant's agents that either avoided or reduced defendant's obligations to the plaintiff that raised a question of exemplary damages. The disposal of the tractor and trailer was deemed a tort.

The trial by jury was on the issue of plaintiff's abandonment or defendants' conversion of the vehicles. It lasted eight days. The jury did an impressively careful job even to the point of requesting that certain specific instructions be repeated to them. The verdict for the plaintiff is supported by the evidence; there is no claim on the part of the defendants that it is not.

Prior to the trial, defendant had raised the question of res judicata. The trial court, in denying the motion, applied the principles in *Russell v. Price,* 94 US 606, set forth in the application (4) and *Cromwell v. Sac,* 94 US 351:

> "Judgment in prior cases operate as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.
>
> "The inquiry must always be as to the point or question actually litigated and determined in the original action for only as to such matters is the judgment conclusive in another action between the parties on a different demand."

The Michigan Supreme Court sustained the trial court by a finding that, under a statute, held the defendants' claims of res judicata to have no merit. After this action

by the Michigan Supreme Court and during the trial, the facts in support of defendants' defense of res judicata were presented by the defendant to the jury who rendered a verdict thereon.

The Court of Appeals, after the jury verdict, on the cross-appeal re-examined the evidence that had been presented to the jury and based thereon held a judgment should have been granted to defendant American Fidelity Fire Insurance Company and a directed verdict should have been granted Henry Sales by the trial court.

This re-examination of the factual evidence is prohibited by the *Seventh Amendment;* it is an infringement of a constitutional guaranty and the action so taken was "a denial of petitioner's rights in substance and effect" referred to in *Oyama v. California, supra.* It was not a judicial act and should be set aside and the judgment entered thereon reversed.

CORRECTIONS AND ADDITIONS TO THE PETITION

The reasons for granting the writ on page 12 of the petition are reemphasized and the following is added thereto:

Involved in this petition is a right and privilege that has the status of a constitutional guaranty. It has been asserted at the proper time and in the proper manner for a decision.

The state court has decided a federal question of substance that is believed has not heretofore been determined by the United States Supreme Court and done so in a way not in accord with the applicable decision of the United States Supreme Court. It should be determined by this Court.

It is claimed that the decision in the state court involves an infringement of the *Seventh Amendment* to the United States Constitution by re-examination of facts tried by a jury other than according to the rules of common law. This was done by violating the rulings of the United States Supreme Court:

(1) A judgment in prior cases operates as an estoppel only as to those matters in issue or points controverted upon determination of which the findings or verdict was rendered.

(2) The inquiry must always be to the point or question actually litigated and determined in the original action for only as to such matters is judgment conclusive in another action between the parties on a different demand.

(3) The doctrine of res judicata involved questions of fact and law and the final resolution of such mixed questions is with the jury.

(4) The examination of facts for other than sufficiency of evidence purposes is not a judicial act.

(5) The right to raise judgment notwithstanding verdict questions based on motions for directed verdicts shall be lost by not strictly adhering to rules on timely pleading.

The Court is respectfully asked to find infringements of the *Seventh Amendment* in the following particulars and take appropriate action therefor:

(1) An Appellate Court may not rule on a motion to dismiss after denial thereof, a pleading over and submitting facts on the question to a jury that renders a verdict thereon.

(2) The Appellate Courts' action of re-examining facts properly tried by a jury and reuling thereon is an invasion of the province of the jury.

(3) That the judgment based on such action must be reversed.

(4) That authority for the reversal is Section 2106, Title 28, or other appropriate authority.

CONCLUSION

The conclusion on page 13 of the petition is corrected as follows and respectfully resubmitted:

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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